SUPREME COURT, U. S.

FILE

APR 19

MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1354

THE BUSINESS ROUNDTABLE, *Petitioner*,

v.

CONSUMERS UNION OF UNITED STATES, INC., ET AL.,

and

COST OF LIVING COUNCIL, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

REPLY BRIEF FOR THE PETITIONER

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This brief is submitted by Petitioner pursuant to Rule 24 in reply to the Opposition to Petition for Writ of Certiorari filed by Respondent Consumers Union.

1. In its Opposition, Respondent Consumers Union contends that this Court should deny certiorari

on the grounds that the Economic Stabilization Act, the statute which is the subject of this litigation, is temporary legislation which may expire on May 1, 1974, and that this case accordingly may not present a matter of future significance. (Opposition, pp. 4-5). Respondent goes on to argue that, if Congress disagrees with the decision of the Temporary Emergency Court of Appeals, it has the power to enact corrective legislation. (Opposition, p. 5). Of course, this same argument could be made about any court decision wrongly interpreting a federal statute. The deficiencies in Respondent's reasoning are twofold. First, this rationale would lead to the untenable conclusion that this Court should never grant certiorari in cases turning on the meaning of a statute because Congress may always change the statute if it does not approve of the decision. Second, corrective legislation does not necessarily operate retrospectively to eliminate the harmful effects of a wrong court decision. The result in this case could possibly be the harmful disclosure of information submitted to the Cost of Living Council (CLC) during the period the old law was in effect. Thus, the impact of the decision on parties affected, including members of Petitioner The Business Roundtable, may not be lessened by the possibility of corrective legislation.

Any argument that the Act may expire is merely conjectural, but even if the Act were not extended in any form, there would remain ample reason for this Court to grant certiorari and review the decision of the Temporary Emergency Court of Appeals because of the possibility of irreparable harm to those firms whose confidential business data might be subject to public disclosure.

2. Respondent Consumers Union maintains that this Court's decisions in *United States* v. *New York Telephone Co.*, 326 U.S. 638 (1946); *Hormel* v. *Helvering*, 312 U.S. 552 (1941); and *Corrigan* v. *Buckley*, 271 U.S. 323 (1926) foreclose review by this Court of the issues of standing and ripeness raised by Petitioner. In fact, none of these cases involved standing or ripeness, issues which go directly to this Court's jurisdiction under Article III of the Constitution. *Barlow* v. *Collins*, 397 U.S. 159 (1970). The portions of the *New York Telephone* and *Corrigan* decisions referred to by Respondent pertained to ordinary arguments on the merits of the particular case which were not mentioned below, and in *Hormel* this Court actually approved the consideration of an issue on appeal which was not raised below. Thus Respondent's own authorities do not support, and *Hormel* in fact rejects, Respondent's position on standing and ripeness.

3. As for exhaustion of administrative remedies, Respondent contends (Opposition, pp. 6-7) that the CLC's decision on its initial request for information has mooted this issue. Such is clearly not the case. Consumers Union has never requested *any* information from the CLC regarding Phase IV reports. Its only request, by letter of August 17, 1973, (Petition, App. E) was for Phase III data. Respondent, however, in its amended complaint and subsequent filings has sought Phase IV data, and the decision of the Temporary Emegency Court of Appeals extends to Phase IV filings. Thus, Respondent has still failed to exhaust its administrative remedies regarding a significant portion of the relief it seeks—that involving the CLC's Phase IV regulations, and this defect was not cured by the CLC's disposition of Respondent's Phase III request.

4. Respondent also contends that Petitioner has made only one substantive argument in support of the petition and that this single argument is inadequate in any event because it asks this Court to balance public policy considerations within the usual province of Congress. (Opposition, pp. 4, 12). Needless to say, because Petitioner has consistently contended that the CLC regulations are fully in accord with Section 205 as a matter of statutory construction, Petitioner's argument on the public policy issues hardly constitutes its "*sole* substantive argument" before this Court. More importantly, these public policy considerations were treated not in an effort to have this Court perform a legislative function but rather to illustrate the factors considered by Congress which were incorporated into the legislation in issue in this case. Petitioner has merely attempted to demonstrate the correctness of the CLC's action when viewed in the light of these considerations.

5. The fact that the Solicitor General has not petitioned for a writ of certiorari should not dissuade this Court from granting certiorari. The sole reasons advanced for the government's decision not to seek review are the pendency of legislation and the possibility that the Economic Stabilization Act will expire. As noted above, neither reason has merit especially from the standpoint of Petitioner and its members who could be directly and adversely affected by the operation of the decision below. Particularly interesting in the face of the government's decision not to seek a writ of certiorari, is the view of the CLC and the Solicitor General that the decision below is erroneous. CLC Memorandum, p. 3; Letter from Solicitor General Bork to John T. Dunlop dated March 4, 1974, attached hereto

as Appendix A, pp. 7-8. While error below may not necessarily be conclusive, in and of itself, on a petition for writ of certiorari, we suggest that, coupled with Petitioner's showing of the strong need for this Court's review of the case, the error of the decision below should carry substantial weight.

6. Finally, we submit that Respondent's Opposition has presented nothing to diminish the need for this Court's review of this case. Indeed, Respondent itself notes that this case involves "a federal question of first impression . . ." (Opposition, p. 6), and Respondent has not in any way refuted Petitioner's showing that review is indicated by the substantial questions presented, including, for example, Petitioner's point that the potential economic impact of the decision below is a matter of important public interest. (Petition, pp. 33-35). When these considerations are added to the government's view that the decision below is erroneous, the equities weigh heavily in favor of review by this Court.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April 1974

APPENDIX A

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C. 20530

March 4, 1974

John T. Dunlop, Director
Economic Stabilization Program
Cost of Living Council
Washington, D.C. 20508

Dear Mr. Dunlop:

After careful review of the decision of the Temporary Emergency Court of Appeals, and after consultation with members of my staff and with attorneys in the Civil Division of the Justice Department, I have decided not to authorize the filing of a petition for a writ of certiorari in *Consumers Union of the United States, Inc., et al.* v. *Cost of Living Council, et al.*

The case involves an issue relating to public disclosure obligations under the Economic Stabilization Act. Specifically, it presents a question as to the scope of the Council's authority to classify as proprietary, and thus exempt from public disclosure, financial data furnished the Council by certain reporting firms. My decision not to seek Supreme Court review is based primarily on my judgment that the pendency of legislation which would clarify these issues makes this an inappropriate vehicle in which to seek further review. My decision in this case does not mean that I would be unwilling to authorize the filing of a petition in a subsequent case presenting the same or similar issues if they arose in a context more suitable for review.

Moreover, my decision not to seek Supreme Court review does not indicate agreement with the decision of the court of appeals. Indeed, in my view, the court's decision probably is erroneous. The court held that data submitted to the Cost of Living Council cannot be defined as

proprietary, and thus be immune from disclosure, if it falls within a category of data furnished in annual reports to the Securities and Exchange Commission. Since the Securities and Exchange Commission annual reports require almost all categories of financial data, public disclosure by the Cost of Living Council will be required even though data furnished to the Council may be far more specific in content than that furnished the Securities and Exchange Commission. Although the legislative history of the disclosure provisions is ambiguous, I do not believe that Congress intended such a result.

Sincerely

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General